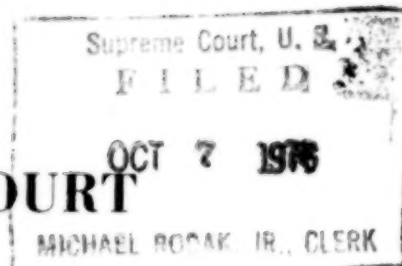


**IN THE SUPREME COURT
OF**

THE UNITED STATES



OCTOBER TERM, 1976

No. 76-67

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON;
HOWARD PREY, LLOYD McLEAN, and
MICHAEL DONEEN, Commissioners
thereof,

Appellants,

VS.

BLAINE M. MADDEN and VIRGINIA C.
MADDEN, husband and wife,

Respondents.

**ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT**

APPELLEES' MOTION TO DISMISS OR AFFIRM

FRANCIS CONKLIN
Attorney at Law
East 12019 Sprague Avenue
Spokane, Washington 99206
(509) 928-1100

Attorney for Appellees

**IN THE SUPREME COURT
OF
THE UNITED STATES**

OCTOBER TERM, 1976

No. 76-67

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON;
HOWARD PREY, LLOYD McLEAN, and
MICHAEL DONEEN, Commissioners
thereof,

Appellants,

vs.

BLAINE M. MADDEN and VIRGINIA C.
MADDEN, husband and wife,

Respondents.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

APPELLEES' MOTION TO DISMISS OR AFFIRM

FRANCIS CONKLIN
Attorney at Law
East 12019 Sprague Avenue
Spokane, Washington 99206
(509) 928-1100

Attorney for Appellees

TABLE OF CONTENTS

| | <i>Page</i> |
|---|-------------|
| Motion to Dismiss | 1 |
| Question Presented..... | 1 |
| Counter Statement of the Case..... | 2 |
| Argument | 4 |
| A. The Appeal is Not Within the Jurisdiction of this Court..... | 4 |
| B. The Question Presented is Not Appealable | 4 |
| C. The Question Presented is So Unsubstantial as Not to Warrant Further Argument..... | 4 |
| Conclusion | 6 |
| Appendix | |
| Memorandum Opinion of Ninth Circuit Court of Appeals..... | A-1 |
| Affidavit..... | B-1 |
| Constitutional Provisions Relied On | C-1 |
| Statutory Provisions Relied On | C-1 |

**IN THE SUPREME COURT
OF
THE UNITED STATES**

OCTOBER TERM, 1976

No. 76-67

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON;
HOWARD PREY, LLOYD McLEAN, and
MICHAEL DONEEN, Commissioners
thereof,

Appellants,

v.s.

BLAINE M. MADDEN and VIRGINIA C.
MADDEN, husband and wife,

Respondents.

**ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT**

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves to dismiss or affirm the appeal on the following grounds:

- (a) The appeal is not within the Jurisdiction of this Court, because it was not taken in conformity with the rules of this Court;

- (b) The question presented is not appealable; and
- (c) The question presented is so unsubstantial as not to warrant further argument.

Question Presented

Whether 28 USCA 1738 requires the United States District Court for the Eastern District of Washington to give full faith and credit to the construction, which the Supreme Court of Washington placed upon R.C.W. 54.16.220 in litigation between the same parties?

Counter Statement of the Case

This action commenced as a condemnation proceeding filed by the Plaintiff/Appellant, PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, Washington, (hereinafter P.U.D.), to condemn certain property held by the Defendants for the construction of Wells Hydroelectric Project on the Columbia River near Azwell, Washington. The jurisdiction of the United States District Court was invoked pursuant to the Federal Power Act, 16 USCA 814.

The District Court, pursuant to a stipulation signed by all parties, condemned the property and adjudicated the PUBLIC UTILITY DISTRICT owner of the property subject only to certain enumerated exceptions relating to irrigation rights. Both the stipulation and judgment *were silent* about Defendant/Appellee, BLAINE M. MADDEN'S, (hereinafter MADDEN), rights under the Hallauer Act, R.C.W. 54.16.220. Judgment was entered March 27, 1967.

Pursuant to the provisions of the Hallauer Act, R.C.W. 54.16.200, MADDEN made timely application to the P.U.D. for an easement as provided in the aforesaid statute. The P.U.D. refused to grant any easement for any purpose. Subsequently, MADDEN caused a road on the condemned property to be graded and utilized the road for a temporary

airstrip. The P.U.D. sought an injunction and judgment of contempt. The United States District Court, after hearing on July 23, 1968, permanently enjoined MADDEN from "entering upon the lands in which ownership and exclusive right to possession was decreed in the Plaintiff by Judgment in this Court in Civil Action No. 2784 for any purpose other than as a member of the general public."

MADDEN then sought a Writ of Mandamus against the P.U.D. and its Commissioners in the Superior Court of Douglas County seeking enforcement of his rights under the Hallauer Act, R.C.W. 54.16.220. The P.U.D. sought to remove this cause of action to the United States District Court, (Cause No. 3172 EDW). The United States District Court denied the petition for removal and remanded the cause to the Douglas County Superior Court.

The Superior Court for Douglas County then heard the cause on the merits and ordered a Writ of Mandamus issued compelling the P.U.D. to grant MADDEN his rights, pursuant to the express terms of R.C.W. 54.16.220, (Hallauer Act).

The Supreme Court of Washington unanimously affirmed the decision of the Superior Court for Douglas County: *State v. P.U.D.*, 83 Wn. 2d 219 (1973), 517 P.2d 585, appeal dismissed 419 U.S. 808 (1974).

The Supreme Court of Washington held that MADDEN'S rights under R.C.W. 54.16.220 were *preserved* in the Federal condemnation proceeding, unless they were *expressly waived*, in that proceeding. The P.U.D. appealed to this Court, and this Court dismissed the appeal for want of jurisdiction. [419 U.S. 808 (1974)].

MADDEN petitioned the United States District Court *pro se* to dissolve the injunction entered against him July 23, 1968, and the District Court refused to dissolve the injunction. The District Court held that the Supreme Court of Washington had erred, because MADDEN'S rights under R.C.W. 54.16.220 were extinguished in the Federal Condemnation proceeding,

unless *expressly reserved*.

The Ninth Circuit Court of Appeals reversed the District Court in the instant cause. [The Memorandum Opinion of the Ninth Circuit Court of Appeals is attached, Appendix A.]

Argument

A. THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT, BECAUSE IT WAS NOT TAKEN IN CONFORMITY WITH THE RULES OF THIS COURT.

Rule 10 and Rule 33 of this Court specifically require that service of all pleadings, motions, etc. must be made on *counsel of record*. Appellant, P.U.D., alleges that a Notice of Appeal to the United States Supreme Court was filed in the Court of Appeals on May 24, 1976. Counsel for Appellee, MADDEN, was not and never has been served with a copy of this Notice, as required by Rules 10 and 33, and the Notice of Appeal is therefore incomplete and void. [Affidavit attached, Appendix B.]

B. THE QUESTION PRESENTED IS NOT APPEALABLE.

This Court has no jurisdiction to review on appeal any decisions of a United States Court of Appeals, except as provided in 28 USCA 1254(2). Appellant, P.U.D., by its own statement concedes that the question presented is not appealable under 28 USCA 1254(2).

C. THE QUESTION PRESENTED IS SO UNSUBSTANTIAL AS NOT TO WARRANT FURTHER ARGUMENT.

State ex rel. Madden v. Public Utility District No. 1, 83 Wn.2d 219, 417 P.2d 585 (1974), was appealed to this Court and dismissed for want of jurisdiction. [419 U.S. 808, 42 L.Ed.2d 33, 95 S.Ct. 20.]

The Supreme Court of Washington rejected Appellant, P.U.D.'s, contention that the Legislature of Washington could

not constitutionally modify the common law definition of a fee simple by enacting conservation measures such as the Hallauer Act. [83 Wn.2d 219, 221-222.] The Supreme Court of Washington also held that the Hallauer Act rights are not extinguished in a Federal condemnation proceeding, unless they are *expressly mentioned* in the final decree. This Court denied review of that decision. [419 U.S. 808.]

The United States District Court for the Eastern District of Washington held that it was not bound by that decision, and that the Supreme Court of Washington was in error. The District Court held that unless the rights granted to MADDEN under the Hallauer Act, R.C.W. 54.16.220, were *expressly reserved* in the Federal condemnation proceeding, they were extinguished.

The Ninth Circuit Court of Appeals reversed the District Court, holding that 28 USC 1938 requires the District Court in the same State to give full faith and credit to a decision of the Supreme Court of Washington involving identity of parties and identity of issues.

THIS JUDGMENT SHOULD BE AFFIRMED.

At no time in the United States District Court did the Appellant, P.U.D., urge the issues, which it now seeks to raise on this appeal:

- (1) Did the Washington Supreme Court and the United States Court of Appeals fail to give full faith and credit to the previous decision of the United States District Court?
- (2) Did the Washington Supreme Court and the United States District, [(sic)], Court of Appeals deprive Appellants of their property without due process of law?

These issues were raised for the first time in Appellee's Petition for Reconsideration in the Court of Appeals. Since

Moreover, if Appellant's position is based upon Article IV, Section 1, of the United States Constitution, (pp. 11 and 12-Jurisdictional Statement), this reliance is obviously misplaced, because Article IV, Section 1, does not apply to Federal Courts sitting in the same state as the state Court in question. There is no "sister state" involved in this controversy.

FOR THE REASONS Stated above, APPELLEE, MADDEN, respectfully submits this Court has no jurisdiction of the issues; and that Appellant presents no substantial question for further argument in this Court.

Respectfully submitted,

Attorney for Appellee, MADDEN

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

On Appeal from the United States District Court
for the Eastern District of Washington

The Federal District Court's judgment entered on March 27, 1967 is not inconsistent with the Maddens' subsequent assertion in state court of their rights under the Hallauer Act (R.C.W. 54.16.220). The federal judgment effectively conveyed to the District all of the Maddens' then title in the subject land, with the exceptions therein expressly stated. But it did not convey the right that the Hallauer Act gave to the Maddens, by operation of state law, to compel the District to "grant back to the former owners of the lands acquired upon their request therefore . . . within sixty days thereafter [after conveyance of title to the District] a perpetual easement

A-1

appurtenant to the adjoining lands and use and improvement of the acquired lands as will not be detrimental to the operation of the hydroelectric project and not be in violation of the required conditions of the District's Federal Power Commission license for the project. . . ." (Hallauer Act, *supra*.)

The subsequent state court decree compelling the P.U.D. to grant back to the Maddens their Hallauer Act easement is final. The judgment was affirmed by the Supreme Court of Washington. (*State ex rel. Madden v. Public Utility District No. 1*, 83 Wn.2d 219, 517 P.2d 585 [1974].) The judgment is entitled to full faith and credit in the Federal District Court. (28 U.S.C. Sec. 1738.)

The District Court erred in refusing to give full faith and credit to the Washington judgment.

The order denying the Maddens' motion to dissolve the injunction granted by the Federal District Court is vacated. The cause is remanded to the District Court for further proceedings, in which the District Court shall give full faith and credit to the judgment of the Washington court, as affirmed by the Supreme Court of Washington (*State ex rel. Madden v. Public Utility District No. 1*, 83 Wn.2d 219, 517 P.2d 585 (1974).)

APPENDIX B

AFFIDAVIT OF FRANCIS CONKLIN

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

FRANCIS CONKLIN, being first duly sworn on oath, deposes and says:

That he is of legal age and competent to testify.

That he was the attorney of record for BLAINE M. MADDEN and VIRGINIA C. MADDEN, husband and wife, in Cause No. 74-3222 in the United States Court of Appeals for the Ninth Circuit.

That no copy of the Notice of Appeal, alleged to have been filed May 24, 1976, in Cause No. 74-3222 in the United States Court of Appeals for the Ninth Circuit, has ever been served on your Affiant.

Further Affiant sayest not.

FRANCIS CONKLIN

On this _____ day of September, 1976, personally appeared before me FRANCIS CONKLIN, to me personally known, and swore that the above and foregoing statement is true to the best of his knowledge and belief.

GIVEN under my hand and official seal the date last above written.

NOTARY PUBLIC in and for the
State of Washington, residing in
Spokane.

APPENDIX C

CONSTITUTIONAL PROVISIONS RELIED ON:

United States Constitution, Article IV, Section 1, in part:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; . . ."

STATUTORY PROVISIONS RELIED ON:

28 USC 1738, State and Territorial statutes and judicial proceedings; full faith and credit:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

28 USC 1254(2), Courts of appeals; certiorari; appeal; certified questions:

"(2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;"

R.C.W. 54.16.220, the *Hallauer Act*, provides as follows:

"Columbia River Hydroelectro Projects—Grant back of easements to former owners. Notwithstanding any other provision of law, every public utility district acquiring privately owned lands, real estate or property for reservoir purposes of a hydroelectric power project dam on the Columbia River, upon acquisition of title to said lands, whether acquired by purchase or condemnation, shall grant back to the former owners of the lands acquired upon their request therefor, whether prior to conveyance of title to the district or within sixty days thereafter, a perpetual easement appurtenant to the adjoining property for such occupancy and use and improvement of the acquired lands as will not be detrimental to the operation of the hydroelectric project and not be in violation of the required conditions of the district's Federal Power Commission license for the project: *Provided* That said former owners shall not thereafter erect any structure or make any extensive physical change thereon except under a permit issued by the public utility district: *Provided further*, That said easement shall include a provision that any shorelands thereunder shall be open to the public, and shall be subject to cancellation upon sixty days notice to the owners by the district that such lands are to be conveyed to another public agency for game or game fish purposes or public recreational use, in which event the owners shall remove any structures they may have erected thereon within a reasonable time without cost to the district. The provisions of this section shall not be applicable with respect to: (1) lands acquired from an owner who does not desire an easement for such occupancy and use; (2) lands acquired from an owner where the entire estate has been acquired; (3) lands acquired for and reasonably necessary for, project structures (including borrow areas) or for relocation of roads, highways, railroads, other utilities or railroad industrial sites; and (4) lands heretofore acquired or disposed of by sale or lease by a public utility district for whatsoever purpose."